



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

January 17, 2003

Ms. Ylisse Y. Janssen
Senior School Law Attorney
Austin Independent School District
111 West 6th Street
Austin, Texas 78703-5300

OR2003-0365

Dear Ms. Janssen:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 175232.

The Austin Independent School District (the "district") received a request for several categories of information, including itemized billing statements of two law firms related to the requestor's son. You state that you have released all of the requested information to the extent that it exists, with the exception of the billing statements, which you assert are excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the requested information is subject to section 552.022 of the Government Code, which provides that

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

....

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege[.]

Gov't Code § 552.022(a)(16). Thus, information contained in attorney fee bills must be released under section 552.022(a)(16) unless it is expressly confidential under other law. You assert that submitted information is protected by sections 552.107 and 552.111. These

sections are discretionary exceptions under the Public Information Act and do not constitute "other law" for purposes of section 552.022. Open Records Decision Nos. 677 at 8-9 (2002), 676 at 5-6 (2002); *see* Open Records Decision Nos. 630 at 4 (1994) (predecessor to section 552.107(1) may be waived), 473 (1987) (governmental body may waive predecessor to section 552.111); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general).

However, the Texas Supreme Court has held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). This office has determined that when the attorney-client privilege or work-product privilege is claimed for information that is subject to release under section 552.022, the proper analysis is whether the information at issue is excepted under Texas Rule of Evidence 503 (attorney-client communications) or Texas Rule of Civil Procedure 192.5 (work product). ORD 676 at 5-6, 677 at 8-9. Although you also assert that the marked information is confidential under rule 1.05 of the Rules of Professional Conduct, this office recently addressed that issue and determined, in light of an opinion of the Texas Commission on Professional Ethics, that rule 1.05 does not make information confidential. *See* ORD 676 at 2-4 (citing Tex. Comm. on Prof'l Ethics, Op. 517, 59 Tex. B.J. 795 (1996)). We will therefore consider whether the fee bills are excepted under the rule 503 or rule 192.5.

Texas Rule of Evidence 503(b)(1) provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer's representative;
- (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
- (D) between representatives of the client or between the client and a representative of the client; or
- (E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503. A communication is “confidential” if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5).

Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.–Houston [14th Dist.] 1993, no writ).

You state that “[i]t is evident from a review of the invoices . . . that certain of these documents reflect legal advice or opinion to the client.” You have not identified which, if any, of the individuals listed in the fee bills is a representative of the district. We have reviewed the submitted records and marked the information that we are able to discern from the face of the bills constitutes privileged communications; only this information may be withheld pursuant to rule 503. *See Strong v. State*, 773 S.W.2d 543, 552 (Tex. Crim. App. 1989) (burden of establishing attorney-client privilege is on party asserting it).

You also contend that portions of the attorney fee bills are protected by the attorney work product privilege. An attorney’s work product is confidential under rule 192.5. Work product is defined as

(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party’s representatives or among a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees, or agents.

TEX. R. CIV. P. 192.5(a). Accordingly, in order to withhold attorney work product from disclosure under rule 192.5, a governmental body must demonstrate that the material, communication, or mental impression was created for trial or in anticipation of litigation. *Id.* To show that the information at issue was created in anticipation of litigation, a

governmental body must demonstrate that (1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and (2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *See National Tank v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A “substantial chance” of litigation does not mean a statistical probability, but rather “that litigation is more than merely an abstract possibility or unwarranted fear.” *Id.* at 204. Information that meets the work product test is confidential under rule 192.5 provided the information does not fall within the purview of the exceptions to the privilege enumerated in rule 192.5(c). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.–Houston [14th Dist.] 1993, no writ).

You state that some of the marked information relates to pending administrative proceedings. However, you have not identified, nor are we able to discern, what information was created for trial or in anticipation of litigation. Neither have you indicated which parties identified in the fee bills are the “party and the party’s representatives[,] consultants, sureties, indemnitors, insurers, employees, or agents.” Finally, having reviewed the information at issue, we find that none of it reveals the mental impressions of the individuals involved. We therefore conclude that you have not shown that any of the information is protected by the attorney work product privilege under rule 192.5, and none of it may be withheld on that basis.

In summary, we have marked information that the district may withhold on the basis of rule 503. The remaining submitted information must be released.¹

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the

¹We note that the student’s identifying information would normally be withheld from disclosure in accordance with the Family Educational Rights and Privacy Act of 1974 (“FERPA”). 20 U.S.C. § 1232g. *See* Open Records Decision Nos. 332 (1982), 206 (1978) (information must be withheld under FERPA only to extent reasonable and necessary to avoid personally identifying particular student). However, as the parent of the student in question, the requestor has a special right of access to his child’s identifying information. *See* 20 U.S.C. §§ 1232g(a)(1)(A) (providing for parental access to education record).

governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/lmt

Ref: ID# 175232

Enc. Submitted documents

c: Mr. Ronnie Schleiss
10300 Jollyville Rd # 927
Austin, Texas 78759
(w/o enclosures)